RESERVE BANK OF AUSTRALIA

Reforms to the Payment Systems (Regulation) Act 1998

Submission to Treasury Consultation Paper

July 2023

Introduction

The Reserve Bank of Australia (the Bank) welcomes the modernisation of the regulatory architecture governing payments in Australia. The way Australians make payments has changed significantly since the existing regulatory frameworks were put in place, and it is important that regulation is able to adapt to new developments and risks as the payments system continues to evolve.

The Bank is the principal regulator of the Australian payments system, with the Bank's payments system policy determined by the Payments System Board. The payments system mandate, powers and responsibilities of the Bank and the Payments System Board are set out in various pieces of legislation, including the *Payment Systems (Regulation) Act 1998* (PSRA).[1]

The PSB has a general duty to direct the Bank's payments system policy to the greatest advantage of the people of Australia. The PSB has a specific duty to ensure that the Bank exercises its powers in a way that best contributes to: controlling risk in the financial system; promoting the efficiency of the payments system; and promoting competition in the market for payment services, consistent with the overall stability of the financial system.

The Bank strongly supports reform of the PSRA. In particular, the Bank supports:

1. the expansion of the regulatory perimeter of the PSRA, by updating existing definitions of a 'payment system' and 'participant', to ensure that all entities that play a role in facilitating or enabling payments, including new entrants, can be appropriately regulated.
2. reforms to ensure the Government can intervene to address emerging payment issues of national significance that lie beyond the remit of independent regulators.
3. other changes to the PSRA to ensure the regulatory architecture is appropriate and effective, such as enabling the Bank to publicly disclose information in certain circumstances, as well as issue directions to, and accept court-enforceable undertakings from, payment system participants.

1 The other relevant pieces of legislation are: *Reserve Bank Act 1959*; *Payment Systems and Netting Act 1998*; and Part 7.3 of the *Corporations Act 2001*.

Expanding the regulatory perimeter of the PSRA

The Bank supports the proposed approach to updating existing definitions of a 'payment system' and 'participant', to expand the regulatory coverage of the PSRA and ensure that all entities that play a role in the payments ecosystem, including new entrants, can be appropriately regulated if in the public interest or national interest. In particular:

- the Bank agrees that it is important for the definition of 'payment system' to extend beyond multilateral arrangements to include bilateral arrangements, including 'three-party' or 'closed loop' systems, to ensure they fall within the regulatory perimeter.
- the Bank also agrees that the PSRA should be capable of being applied to *all* entities that play a role in the payments value chain, including entities that facilitate or enable payments. For example, it will be particularly important to capture digital wallet providers, given strong growth in consumer use of digital wallets, as well as the providers of key infrastructure, such as mobile phone handset manufacturers and cloud computing service providers, to ensure that any competition and resilience concerns can be addressed if in the public or national interest.

The Bank supports a technology-neutral approach to updating the existing definitions. However, it could be beneficial for the definition of 'participant' to list different classes of participants, as in the United Kingdom. This could help make the interaction between the PSRA and the proposed payments licensing framework clearer, particularly by clarifying the relationship between a payment system 'participant' and a 'payment service provider' (which would need a licence).

The consultation paper notes that the updated definition of 'participant' could include the providers of cash-in-transit services. In general, the Bank welcomes the Government's support for ensuring that Australians maintain adequate access to cash, as noted in its Strategic Plan for Australia's Payments System; this is important given that cash helps financial inclusion, provides consumers with another choice of payment mechanism, adds resilience to the system and provides a safety net in times of crisis. The sustainability of cash-in-transit services, while important, is just one part of the broad set of policy challenges that need to be confronted to maintain cash access in the face of declining transactional demand for cash. Accordingly, it is not clear to the Bank that the PSRA is the most appropriate regulatory framework for dealing with the sustainability and competitiveness of the cash-in-transit industry.

Ministerial powers

The Bank supports the Treasurer being provided with new ministerial powers to address payments system issues that are outside the scope of the Bank's public interest powers, where that would be in the national interest. This would be consistent with the June 2021 Payments System Review (the Treasury Review) recommendation that the new ministerial powers be designed to ensure that emerging payments issues that fall outside the scope of the Bank's mandate – such as issues of national security or consumer protection – are able to be regulated where it is in the national interest to do so.[2]

Implemented appropriately, the Ministerial powers will provide an important back-stop to the Bank's powers under the PSRA. This includes ensuring that particular service providers or aspects of their operations – such as mobile wallet providers – can be regulated in the national interest.

2 See Treasury (2021).

The consultation paper notes that the "proposal is aimed at preserving the RBA's independence with respect to matters wholly in the 'public interest' and … [t]he new powers for the Treasurer are not intended to operate to empower the Treasurer to stand in the shoes of the RBA and remake a decision of the RBA made wholly on public interest grounds" (Treasury 2023, p 12). The Bank strongly supports and welcomes the intention to preserve the Payments System Board's independence.

The paper also notes that "in determining whether action is warranted in the 'national interest', the Treasurer can have regard to factors that are relevant to the 'public interest' test, raising the prospect of an overlap between the powers of the Treasurer and the RBA" (Treasury 2023, p 13). It also notes that "decisions taken in the national interest [by the Treasurer] would take priority over decisions based on public interest [by the RBA]" (Treasury 2023, p 13). Given this potential overlap, it will be very important for the amended PSRA to clearly articulate and delineate the Treasurer's and the Bank's powers to ensure that the Payments System Board's independence is preserved as intended. Any doubt about the independence of the Payments System Board and the Bank, and the finality of its regulation, would both hamper the effectiveness of the Bank in meeting its payments policy mandate and create significant regulatory uncertainty for the payments industry, which would in turn hamper innovation and investment.

In the Bank's view, it will also be important for the legislation to:

- clearly set out how any conflict or priority provisions regarding the Treasurer's and the Bank's powers would operate to provide regulatory certainty for industry.
- include appropriate mechanisms for transparency around the exercise of the Treasurer's power, particularly where it would take priority over a decision of the Payments System Board.
- include the proposed requirement for the Treasurer to consult with a regulator before allocating responsibilities under the PSRA to that regulator; as the consultation paper notes, such an approach would be consistent with the conditions for issuing directions to the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) under the general directions powers applicable to them.

Finally, the Bank agrees that consequential amendments to the PSRA will be necessary to provide sufficient powers and protections to those subject to Ministerial directions, to ensure that the Bank and other regulators can give effect to the directions as intended.

- In particular, if the Treasurer is to direct action and assign responsibilities in fields that are outside the mandate and powers of the Bank, the PSRA will need to be amended to permit the Bank to regulate in those fields (if directed). Similarly, if the Treasurer is to allocate responsibilities to another Treasury portfolio regulator, the PSRA will need to be amended to permit those other regulators to exercise PSRA powers (again, if directed).
- The PSRA will also need to set out appropriate protections for relevant regulators including the Bank (and their staff and officials, such as members of the Payments System Board) when the regulator acts in accordance with a Ministerial direction.
- The role of the Payments System Board in the exercise of any PSRA powers that the Bank is directed by the Treasurer to exercise would also need to be made clear.

Further reforms for testing

The Bank supports enhancements to the regulatory toolkit to make sure the Bank is well positioned to deal with future challenges in the payments landscape.

Directions power

The current power of the Bank to issue directions is limited in scope. Under section 21 of the PSRA, the Bank may give a direction to a participant in a designated payment system if the Bank considers that: the participant has failed to comply with a standard, or the participant has failed to comply with an access regime. A necessary pre-requisite is that the Bank has imposed a standard or access regime. Further, judicial interpretation of the Bank's power to impose standards has indicated certain limitations of that power.

Accordingly, the Bank's view is that a proportionate, targeted, effective directions power, providing for both 'specific' and 'general directions' following consultation, would give the Bank the necessary flexibility in its toolkit to address issues in payment systems in a proportionate manner, without imposing the additional regulatory burden of a standard or access regime. An example of a specific direction (drawn from the United Kingdom) would be requiring specific payment systems to prepare and make available the documentation required to allow conversion between existing messaging standards and ISO 20022. As noted in the consultation paper, a general direction could impose regulatory obligations relating to broader conduct or operating procedures (such as a general obligation to publish interoperability information).

Information disclosure powers

The Bank supports the proposal to introduce a mechanism that allows the Bank to publicly disclose participant information in the public interest without having to obtain the participant's consent (at present the Bank is generally required to obtain consent from a participant before publicly disclosing identifying information about that participant). Public disclosure of such information in appropriate circumstances encourages compliance with policy objectives and provides transparency to participants, and could form part of a more graduated regulatory toolkit (for example, as an alternative to imposing a standard). Appropriate safeguards would need to be in place, such as notification requirements and the need for the action to be justified in the public interest.

There is some precedent for public disclosure regimes. For example, data in a reporting document required to be given to APRA under the *Financial Sector (Collection of Data) Act 2001* is protected information under section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act). However, there is a process under section 57 of the APRA Act for APRA to determine that all or part of a reporting document does not contain confidential information where APRA considers that the benefit to the public from disclosure of that document or part outweighs any detriment to commercial interests that it may cause. This process requires consultation, and the determination is a legislative instrument. A similar regime could be established for an information disclosure power conferred on the Bank.

Court enforceable undertakings

The Bank currently obtains voluntary undertakings from organisations to promote the Bank's objectives. For example, the Bank has obtained undertakings from both Visa and Mastercard to ensure that merchants choosing to accept Mastercard or Visa credit cards are not obliged by scheme rules to accept Mastercard or Visa debit or prepaid cards, and vice-versa. However, these undertakings may,

with limited notice, be unilaterally revoked at any time without consultation or the consent of the Bank. Further, in the event of non-compliance with a voluntary undertaking, the Bank would likely need to consider exercising its powers under the PSRA (that is, consulting on and setting a standard if it determined that it was in the public interest to do so). This is administratively burdensome, has long lead times and gives rise to regulatory uncertainty.

To adequately discharge its mandate and provide regulatory certainty, the Bank needs to be well equipped with powers to sufficiently address compliance issues, particularly as the payments landscape continues to evolve and large technology companies engage with the Australian payments system. Accordingly, the Bank's view is that there is a strong case for it being empowered to accept court-enforceable undertakings from payment system participants, which would enable a written agreement between a participant and the Bank to be enforceable against the participant in court. This reform would bring the Bank up to date with comparable agencies and regimes, including ASIC, the ACCC and APRA.

Graduated penalty regime

The Bank agrees that the current *criminal* penalties for contraventions of the PSRA are excessive in their nature relative to the kind of non-compliance contemplated under the PSRA. Accordingly, the Bank supports a more graduated penalty regime being included in the PSRA, including both civil and criminal penalty provisions with appropriately calibrated penalties. This would ensure that there is flexibility to impose proportionate penalties to better support enforcement and compliance. The inclusion of civil penalties would be particularly appropriate to address any non-compliance with the Bank's information gathering powers. The Bank would also support updating the PSRA to permit the imposition of penalties for breaches of standards and access regimes directly, rather than only for failure to comply with a direction to rectify such breaches (under section 21), because this would enable the Bank to remedy breaches more efficiently.

Resolving differences of opinion between the Government and the RBA

The Bank's view is that section 11 of the *Reserve Bank Act 1959* is an appropriate mechanism to resolve differences of opinion between the Government and the Bank on payments system policy. It permits the Government to override decisions of the Payments System Board, made in the public interest under the PSRA, through a rigorous and transparent process, which is an effective safeguard to protect the Bank's independence. Section 11 makes the respective responsibilities and positions of the Bank and of the Treasurer/Government very clear. While the Government's review of the RBA recommended repealing section 11 in relation to the Reserve Bank Board's decisions, an important distinction is that the Government has no direct role in the formulation of monetary policy. By contrast, it is envisaged that the Government, through the Treasurer, will take on an enhanced leadership role in payments system policy, raising the possibility of differences of opinion between the Government and the Bank.

Other matters

As part of its work updating the payments regulatory framework, the Treasury is developing a new tiered licensing regime for SVFs, currently known as purchased payment facilities (PPFs). The RBA has regulatory responsibility for some PPFs under Part 4 of the PSRA. Under the proposed SVF licensing regime, ASIC and APRA will become the sole responsible regulators for SVFs/PPFs and payment stablecoins.

One consequence of the PSRA reforms preceding the proposed licensing framework is that the Government may need to consider interim arrangements for PPFs, to facilitate a smooth transition from the PSRA PPF regime to the new payments licensing framework. Removing the PSRA PPF provisions before the SVF licensing framework is legislated would result in a regulatory gap, and licensing under the new framework may take some time.

Reserve Bank of Australia
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References

Treasury (2021), 'Payments System Review: From System to Ecosystem', June.

Treasury (2023), 'Reforms to the Payment Systems (Regulation) Act 1998: Consultation paper', June.